

No. 82-1443

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In the Supreme Court of the United States

OCTOBER TERM, 1982

THEODORE L. LOMBARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a former serviceman, allegedly injured by the government while on active duty and incident to service, may sue the government for damages for negligently failing to warn him of the latent effects of the injury, when the alleged negligent failure to warn began while the serviceman was on active duty.

2. Whether such a serviceman's children may sue the government for damages for injuries allegedly resulting from genetic damage done to the serviceman while on active duty.

3. Whether the serviceman's wife may sue the government for damages for emotional distress allegedly resulting from the injuries to the serviceman and the children.

4. Whether petitioners' claims against individual government officials were correctly dismissed, when the complaint failed to allege with specificity how the officials had wronged petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 690 F.2d 215. The opinion of the district court (Supp. Pet. App. A47-A57) is reported at 530 F. Supp. 918.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1982 (Supp. Pet. App. A57). A petition for rehearing was denied on December 2, 1982 (Pet. App. A41-A42). The petition for a writ of certiorari was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Theodore Lombard is an ex-serviceman; the other petitioners are his wife and children. Petitioners allege that between 1944 and 1946, Theodore Lombard, on active duty in the Army, worked on the Manhattan Project,

the effort to develop the first atomic bomb. During that time, Lombard allegedly was exposed to radioactive materials that caused physical and genetic damage to him; petitioners further allege that the government negligently failed to warn Lombard, either during or after his service, of the hazard to which he had been subjected. Pet. App. A2-A3.

Petitioners sued the United States and eight government officials for \$35 million in damages. They claimed that the government's negligent failure to warn injured Theodore Lombard; that because of Lombard's genetic damage, the children suffer from certain genetic defects; and that Ruth Lombard, Theodore Lombard's wife, suffered mental anguish and emotional distress from caring for her husband and children. They further claimed that the individual respondents, who are government officials, committed torts against them and violated their constitutional rights in connection with the failure to warn. Pet. App. A3 & n.1; Supp. Pet. App. A47-A48.

2. The United States District Court for the District of Columbia dismissed the complaint. In rejecting petitioners' claims against the United States, the district court relied principally on *Feres v. United States*, 340 U.S. 135 (1950), which held that the Federal Tort Claims Act (FTCA) does not waive the government's sovereign immunity from suits by servicemen seeking to recover for injuries incident to active military duty. Supp. Pet. App. A48-A54. The district court dismissed the claims against the individual defendants on the ground that while "[t]he complaint makes * * * broad and vague allegations of a 'conspiracy' to violate [petitioners'] constitutional rights, * * * none of the individual defendants [is] named in the body of the complaint, nor is any specific act of any of the defendants pointed out as part of the conspiracy to deny Mr. Lombard information about his exposure to radiation." *Id.* at A55-A56. In fact,

the district court noted, seven of the eight individual defendants had not yet taken office when petitioners filed their administrative claims under the FTCA (see 28 U.S.C. 2675)—claims that of course revealed that petitioners by that time knew of the hazards to which Theodore Lombard had been exposed. Supp. Pet. App. A56.

The court of appeals affirmed. It noted that petitioners explicitly alleged that the government's failure to warn began at the time Theodore Lombard was first exposed to radiation—while he was on active duty. Consequently, the court reasoned, “[w]e are not dealing with two separate torts * * * but one continuous tort” that began when Theodore Lombard was on active duty. Pet. App. A11 (emphasis omitted). The court accordingly concluded that *Feres* precluded Theodore Lombard's suit, just as it would preclude any suit by a serviceman for an alleged tort incident to active duty. *Id.* at A10-A11.

The court of appeals upheld the dismissal of the other petitioners' FTCA claims on the ground that “[i]t is well established that *Feres* bars recovery by family members where the cause of action is ancillary or derivative to the serviceman's action for his own injury received incident to military service.” Pet. App. A16. The court explained that a trial of the claims of Ruth Lombard or the children would require the same inquiry into military orders as would the trial of Theodore Lombard's own claim, and that the principal purpose of *Feres* is to avoid such an inquiry and its attendant threat to military discipline. See *id.* at A18, A21-A22, A23-A24.

The court of appeals affirmed the dismissal of petitioners' claims against the individual respondents for essentially the reasons given by the district court. The court of appeals explained: “The claims against the individual defendants are deficient because those defendants only came into office

shortly before Lombard's complaint was filed. * * * The allegations against them in their individual capacity are accordingly vague, conclusory and impermissibly imprecise." Pet. App. A24; see *id.* at A26.

Judge Ginsburg agreed with the majority's disposition of the claims against the individual respondents but dissented from the disposition of the FTCA claims. Instead of affirming the dismissal of Theodore Lombard's claim against the United States, she would have remanded to "accord Theodore Lombard an opportunity, with the aid of discovery, to further develop and restate his claim." Pet. App. A33. Judge Ginsburg acknowledged that the trial of the FTCA claims of Ruth Lombard and the children would involve an inquiry into the military orders given Theodore Lombard, but she reasoned that the "extended interval between the issuance of the orders and the appearance of the injuries [to the children] dilutes the argument that an airing in court of the Lombard family members' claims would occasion genuine harm to the command structure of the armed forces." *Id.* at A38. Judge Ginsburg accordingly concluded that "[w]hile the question is not free from doubt, I do not believe the risk to military discipline posed by the FTCA claims of Ruth Lombard and the Lombard children is sufficiently grave to bring those claims within the reach of a reasonably delineated *Feres* doctrine." *Ibid.*

ARGUMENT

1. The court of appeals' principal holding is that *Feres* bars an ex-serviceman's claim that the government wrongfully failed to warn him of the hazards to which he was exposed while on active duty, when the government knew of those hazards while the serviceman was still on active duty. This Court has recently declined to review a decision reaching the same conclusion. *Laswell v. United States*, 683 F.2d 261 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22,

1983). As we explained (at 4-5) in our Memorandum in Opposition in *Laswell*,¹ every court of appeals that has considered this question has reached the same conclusion as the court below. The dangers to military discipline that arise from a serviceman's suit claiming that a military order inflicted an immediately-apparent injury on him also arise when a serviceman asserts that the order caused a latent injury about which the government failed to warn him.

Petitioners appear not to take issue with this holding of the court of appeals. Instead, they assert that the court of appeals actually held that *Feres* would bar even a claim that the government wrongfully failed to warn of risks of which it learned only "[a]fter the [v]eteran [r]eturned to [c]ivilian life" (Pet. 6; see *id.* at 6-7).² But the court of appeals' decision was squarely based on the premise that "[t]here is no allegation that the Government learned of the hazards of radiation poisoning *only after* Lombard left the service" (Pet. App. A12 n.11; emphasis in original). See also *id.* at A11 ("Lombard concedes that the Army knew of the potential dangers involved in exposing servicemen to radioactive substances at the time of the exposure itself"). The court of appeals simply did not address the question petitioners ask

¹We have sent a copy of this memorandum to counsel for petitioners.

²This is also the premise of petitioners' assertion (Pet. 7) that the decision below conflicts with *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981). In fact, *Broudy* only left open the possibility—and did not hold—that *Feres* would permit a claim alleging a failure to warn of hazards of which the government learned after the serviceman's discharge. See *id.* at 128-129. *Broudy* ruled unequivocally that *Feres* precludes a claim based on a failure to warn when, as in this case, the government knew of the hazards while the serviceman was on active duty. See *id.* at 128-129 & n.6 (if such claims were permitted, "a party could completely abrogate the *Feres* doctrine by alleging a post-service duty to warn, monitor or treat whenever the consequences of an allegedly negligent act continued or manifested themselves after the injured party left the service").

this Court to review—whether they would have stated a claim if they had alleged that the government learned of the hazards only after Theodore Lombard had been discharged from military service—because it found no such allegation in the complaint.

To be sure, petitioners also assert (Pet. 13) that they “intended to allege that they suffered independent injuries as a result of government wrongdoing in the post-discharge period based on knowledge of radiation risks it acquired in that period.” But as the court of appeals showed, petitioners’ complaint unequivocally stated that the government’s “conceal[ment]” of information about radiation hazards began in 1944. Pet. App. A11. Judge Ginsburg agreed that “[t]he Lombards apparently concede the government’s awareness of serious radiation-related hazards while Theodore Lombard served in the Army.” *Id.* at A32-A33. The question whether to remand to permit petitioners to conduct further discovery and amend their complaint was confided to the discretion of the courts below and does not warrant this Court’s review.

2. Petitioners also contend (Pet. 7-9) that the court of appeals erred in upholding the dismissal of the claims of Ruth Lombard and the children. The Court has twice recently declined to review substantively identical contentions. *Laswell v. United States*, *supra*; *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982) (No. 81-1658).³ As we explained in our Memoranda in Opposition in *Laswell* and *Monaco*, and as the court below stated, when a serviceman suffers an injury incident to military service, his relatives will frequently be able to show derivative injuries—resulting from their emotional, marital, financial, or, as in this case, genetic relationship to the serviceman. To permit relatives to bring suits

³We have sent a copy of our Memorandum in Opposition in *Monaco* to counsel for petitioners.

based on those derivative injuries would plainly defeat the objectives that the *Feres* doctrine is intended to protect; as this Court has remarked, "the effect of [an] action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party" (*Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977)).⁴

⁴Petitioners are plainly incorrect in their assertions (Pet. 8-9) that the court of appeals' decision conflicts with the decisions of other courts of appeals on this point. In *Johnson v. United States*, 631 F.2d 34 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981), the court *denied* recovery to a serviceman's widow, and in *Watkins v. United States*, 589 F.2d 214 (5th Cir. 1979), the serviceman apparently was off duty when he received negligent treatment from a military doctor (see *id.* at 215; *Brooks v. United States*, 337 U.S. 49 (1949)). Moreover, in *Watkins*, and in a claim that was not reached in *Johnson* (but to which petitioners apparently are referring), civilian plaintiffs claimed that they were injured by servicemen with psychiatric problems that the government was negligent in treating. See 631 F.2d at 35 & n.2. These civilians' claims, unlike the claims of Ruth Lombard and the Lombard children, do not derive from the injury to the serviceman, and they present wholly different questions—concerning, for example, the scope of the government's duty to civilians who foreseeably come in contact with servicemen—from those that would be presented in a suit by a serviceman.

Petitioners are also incorrect in asserting that any case has ever suggested that "the status of the plaintiff at the time of the injury"—that is, whether the plaintiff was a civilian or in the military—is "the critical factor in applying *Feres*" (Pet. 9). In *Feres* itself, which decided three consolidated cases, two of the plaintiffs were widows of servicemen and had never been in the armed forces themselves. See 340 U.S. at 136-137. In any event, *Stencel Aero Engineering Corp. v. United States*, *supra*, leaves no doubt that a civilian's claim can be barred by *Feres* when it derives from a serviceman's claim.

Petitioners suggest in addition (Pet. 8-9) that the court of appeals' decision conflicts with *Kohn v. United States*, 680 F.2d 922 (2d Cir. 1982). As we explained in our Memorandum in Opposition in *Laswell* (at 5 n.4), however, *Kohn* involved a claim that "derive[d] from events that occurred only after [the serviceman's] death." 680 F.2d at 926. Furthermore, "the wrongful acts alleged [in *Kohn* were] completely independent of the purported negligent and intentional misconduct that led to" the serviceman's death. *Ibid.*

3. Petitioners also seek damages from the individual respondents, who are or were government officials. In *Chappell v. Wallace*, No. 82-167 (argued Apr. 26, 1983), this Court is considering the question whether a serviceman may sue his superiors for damages for an alleged constitutional violation incident to military service. But the court of appeals unanimously concluded that petitioners had not stated a claim against the individual respondents because they failed to make any allegations showing how "officials appointed long after Theodore Lombard's exposure to radioactive materials, his discharge from military service, and the birth of his children" (Pet. App. A27 (Ginsburg, J.); footnote omitted) could possibly have been responsible for petitioners' injuries. Petitioners still do not make any attempt to explain how these officials could have wronged them (see Pet. 10). Accordingly, whatever the outcome of *Chappell v. Wallace*, petitioners' claims against the individual respondents were correctly dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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